BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 135, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC (Ralphs Grocery Company) Respondent, and BRANDON DION, Charging Party.	Case No. 21-CB-112391

BRIEF OF UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 135, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF EXCEPTIONS

SCHWARTZ, STEINSAPIR, DOHRMANN & SOMMERS LLP
TAMRA M. SMITH
6300 Wilshire Boulevard, Suite 2000
Los Angeles, California 90048-5268
Telephone: (323) 655-4700
Attorneys for United Food and Commercial Workers Union

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INTRODUCTION

The Administrative Law Judge's Decision holds that Section 8(b)(1)(A) of the Act bars the Union from requiring new employees, both those who are applying for membership in the Union and those who elect to pay either an agency fee or their financial core share, to come to the Union's offices to fill out the necessary paperwork in person. According to the Administrative Law Judge, a union rule that imposes any burden on employees in connection with either joining or refraining from joining the Union, even one that applies equally to both prospective members and objectors, violates the Act.

This is a remarkable holding, one that the Board itself has never made. The reason for that is simple: it is at odds with both the Supreme Court's decisions on this point and the basic policies underlying the Act.

The General Counsel has charged United Food and Commercial Workers Union Local 135 with violating its duty of fair representation by requiring the Charging Party to come to its office in order to either sign up as a member or invoke his rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988). As the Supreme Court held in *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), the Board and the courts apply the same standard when judging union conduct in the arena of union security that they apply in every other area in which the duty of fair representation applies. The Court in *Marquez* made this point in terms too clear to be misunderstood:

> Our holding in *Beck* did not alter the standard for finding conduct "arbitrary". . . . [U]nder the "arbitrary" prong, a union's actions breach the duty of fair representation "only if [the union's conduct] can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly "irrational' or 'arbitrary.'"

Id., 525 U.S. at 45, quoting *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991).

The Administrative Law Judge, however, applied a different standard. While she acknowledged that the Union had raised "legitimate reasons" for its requirement that new hires affiliate in person, she nonetheless concluded that this requirement

violated the Act because (1) it imposed a significant burden on employees, whether affiliating as full members, nonmembers who pay an agency fee, or *Beck* objectors, (2) that may not have been justified by any cost savings that the Union might realize from the requirement. (ALJ Decision at 13:9-15) That decision simply cannot be squared with either the law or the facts.

First, the decision applies a balancing test even though the Supreme Court has made it clear that a far more deferential standard applies. The Administrative Law Judge could not have possibly found that the Union violated the Act if she had applied the "so far outside a wide range of reasonableness" standard that the Supreme Court directed the Board to follow in *Marquez* and *O'Neill*; far from it, the decision concedes that the Union's reasons for the requirement were "legitimate," which bars any possible finding that they were either "irrational" or "arbitrary."

Second, even if this balancing test were appropriate, the decision's application of it to the facts in this case would still not pass muster. The burden of coming to the Union's office is not significant, given the leeway that the Union allows for those for whom travel would present practical problems.

Furthermore, even if the burden of coming to the Union's office were significant, the Union's concerns about the possibility of forgery or impersonation and its desire to speak in person to new hires about their rights more than outweigh it. The decision is only able to hold otherwise by ignoring the evidence that does not fit its desired result: while it describes the Union's concerns as legitimate, it then ignores them when it comes time to apply the balancing test to the facts, choosing instead to treat the possible cost savings that the requirement might produce as the only possible justification for it. Unable to explain away these concerns, the decision simply ignores them. It should be reversed and the complaint against the Union should be dismissed.

The other part of the Administrative Law Judge's decision should be reversed as well. The decision held that the Union breached its duty of fair representation by failing to give the Charging Party a breakdown of its chargeable and non-chargeable

expenses. This obligation only arises, however, if and when an employee objects to paying for the union's non-representational activities.

The Charging Party has never advised Local 135 that he objects to paying for its non-representational activities on ideological grounds; on the contrary, he informed the Union that he would pay the full dues required to become a member later, when he got closer to graduating from high school. He had, in other words, no objection to the Union's use of a portion of his dues on non-representational matters; his only desire was to pay less, if possible. This portion of the Complaint must also be dismissed.

II

STATEMENT OF THE CASE

A. DION BEGINS HIS EMPLOYMENT IN THE BARGAINING UNIT

Dion began working for Ralphs Grocery Company ("Ralphs" or "the Employer") as a courtesy clerk in its Oceanside, California store on or about June 29, 2013. (JX 1, ¶ 2; Tr. 23) The Union and Ralphs are parties to a collective bargaining agreement ("the Agreement") that governs the terms and conditions of Dion's employment with Ralphs. The Agreement contains a union security clause. (JX 1, ¶ 3)

B. THE UNION SENDS DION ITS STANDARD "WELCOME LETTER"

On July 12, 2013 the Union sent Dion a letter and attachments, totaling five pages. (JX 1, ¶ 5 & Exh. 2) The first page was a "welcome letter" which congratulated him on his employment, notified him of the union security clause of the Agreement and provided the dues rate for his job classification. The letter provided: "All new hires are required to come to one of our offices to affiliate in person with Local 135." (JX 1, Exh. 2 at 1) The letter provided Dion a deadline of August 9, 2013 to affiliate with the Union.

One of the enclosures to the welcome letter was a document, which notified Dion of his "right to refrain from being a member of the Union" and to "pay a reduced fee that reflects the cost of representation." (JX 1, Exh. 2, at 4) That document instructed the reader to "notify the union, in writing, if this is the route you choose, and you will be provided additional information." (*Id.*)

The Union's Secretary-Treasurer, Rosalyn Hackworth, explained that the Union uses the word "affiliate" to describe the procedure whereby a new hire establishes contact with the Union either as a full Union member, a non-member, a Beck objector, or a religious objector. (Tr. 69-70)

C. THE UNION SENDS DION A DUES DELINQUENCY LETTER

The Union neither heard from Dion nor received a dues payment from him by the August 9, 2014 deadline. Therefore, on August 16, 2013, the Union sent Dion a standard dues delinquency letter, in which it provided him until September 13, 2013 to fulfill his financial obligations to the Union. (JX 1, Exh. 3) The letter further provided: "We understand that this may be your first experience with a labor union and we would love the opportunity to explain the benefits of being a Union member. We look forward to seeing you at one of our offices to begin your membership." (*Id.*)

D. DION SENDS A LETTER TO THE UNION DECLINING MEMBERSHIP

On August 20, 2013, the Union received a letter that purported to be from the Charging Party. (Tr. 85-86; JX 1, ¶ 9). In the letter, Dion stated his intent to "refrain from being a member of the Union," but expressed an interest in joining the Union at a later date. In particular, he stated: "I would like to be able to join the union once I am closer to high school graduation." In explaining his decision to decline Union membership at present, Dion stated: "I may want to join the union later, but right now I am only 16 and working part-time while I go to high school. Because I won't be working a lot of hours and I'm still in high school I'm not ready to be a union member." (JX 1, Exh. 4)

On the subject of fees, Dion wrote: "Please let me know about the reduced fee for non-members. From what I understand this is an agency fee for the costs of collective bargaining, contract administration, and grievance adjustment." (*Id.*)

E. THE UNION REDUCES THE CHARGING PARTY'S DUES

On August 22, 2013, the Union mailed Dion a letter confirming receipt of his request for reduced dues. (JX 1, ¶ 11 & Exh. 5) The letter notified Dion of his new dues

rate and further provided: "You will need to come in and sign up as a Beck member and relinquish your rights as a union member." (JX 1, Exh. 5)

Dion has never come to the Union's office. The Union reduced his dues based solely on his letter. (Tr. 75-76, 97)

F. DION'S MOTHER CALLS THE UNION

1. Dion's Mother's Alleged Call in July 2013

After Dion received the Union's first letter in July 2013, his mother claims to have called the Union three times (Tr. 31). She asserts the first call was in July 2013, about seven to ten days after Dion received the Union's first letter. (Tr. 31-32)

The Union has records of only two calls from Dion's mother, both in August 2013. (RX 1; Tr. 82) The Union maintains detailed, contemporaneous records of all of its contacts with, or on behalf of, represented employees regarding membership- and dues-related issues; however, it cannot make these notations in members' computerized files when callers fail to identify themselves or the bargaining unit members on whose behalf they are calling. (Tr. 81-82)

Dion's mother claimed she couldn't recall whether she mentioned her son by name when she called the Union the first time. (Tr. 41) She also could not recall which Union office she called, whether her call was answered by a live person or a recording, or which department she selected to be transferred to when she called. (Tr. 40) During this call, she allegedly spoke to a man – whom she could not identify by name or title – for ten to fifteen minutes. (Tr. 32, 40-41) When she asked what Dion's reduced fees would be if he declined membership, the man allegedly told her he didn't have that information available, that it would have to be calculated, and that Dion would have to come into the office for that information. (Tr. 32)

2. Dion's Mother's August 19, 2013 Call

On August 19, 2013, after Dion received the Union's August 16, 2013 dues delinquency letter, his mother called the Union and spoke to a membership clerk, Vicki Miller. (Tr. 82-83) Immediately after speaking with Dion's mother, Miller documented

the substance of the call, in accordance with the Union's regular business practice of documenting all such calls with "no lag time." (Tr. 81-82, 83) Miller's description of the call was: "Members mother called to say that he had sent a certified letter to say that he didn't want to join the union and requested lower fees. Was told he would have to come into the office in person." (RX 1 at 2)

Linsdsey Bensinger, the head of the Union's membership department and Miller's supervisor (Tr. 80), also remembers this call. Bensinger testified that Miller put Dion's mother on hold and asked her (Bensinger) whether the Union had received a certified letter from Dion. Bensinger responded that the Union had not received a letter from Dion. (Tr. 82-83)

Dion's mother described the call in a similar manner. She testified she spoke to a woman who looked up Dion on the computer, advised her that the Union had not received his letter, and stated that Dion would have to come to the Union's office. (Tr. 33-34, 41-42)

3. Dion's Mother's August 20, 2013 Call

i. Her Conversation with Lindsey Bensinger

Shortly after the Union received Dion's letter on August 20, 2013, his mother called again. Miller initially fielded the call, then transferred it to Bensinger. As Bensinger testified, Dion's mother asked whether the Union had received Dion's letter. Bensinger confirmed the Union had. Dion's mother stated that she wanted Dion to pay reduced fees.

Bensinger advised Dion's mother that Dion could give up his rights as a union member and affiliate as a non-member, but he would need to come to the Union's office to affiliate in person and fill out paperwork, as was the Union's standard procedure. Bensinger denied suggesting to Dion's mother that full Union membership was required, or that Dion would be fired or removed from the schedule if he failed to affiliate in person. (Tr. 84, 90-91)

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Bensinger then transferred the call to Secretary-Treasurer Hackworth. (Tr. 83-84) Immediately after transferring the call, Bensinger documented the substance of her conversation with Dion's mother, in accordance with the Union's regular business practice. (Tr. 84-85) Bensinger's written description of the call is consistent with (albeit slightly more detailed than) her testimony at the hearing. Bensinger wrote:

> Mbrs mom Jennifer mailed in letter requesting her son to refrain from joining the union. I advsd her he could give up his rights as a union mbr but still be required to come in and affiliate non mbr status, she wants him to pay reduced fees when he decides to come in. She also requested us to mail her all the info regarding this request. I advsed her we needed to speak to the mbr if this was his decision. She advsd me no, he was in school and only 16. She also said she has a lawyer willing to represent them. I advsd her he would still need to come in. Scanned letter and gave to MK. Transfered Jennifer to RH.

(RX 1, at 1)

Dion's mother's recollection of this conversation conflicted not only with Bensinger's but with her own as well. She insisted that Bensinger said during this phone conversation that Dion was required to join the Union (Tr. 36), an allegation that Bensinger denied. (Tr. 84)

Dion's mother gave varying responses when asked whether anyone from the Union mentioned Dion's right to affiliate as a nonmember. First, she claimed she could not recall (Tr. 43-44), then she claimed that she did not understand the question. (Tr. 44-45) With regard to the word "affiliate," she volunteered that she did not understand "all the legal ramifications of that with regard to the Union." (Tr. 43) Similarly, she couldn't recall whether anyone from the Union mentioned "Beck" status during the phone call, but explained that even if they had, she would not have understood what it meant. (Tr. 46)

ii. Her Conversation with Rosalyn Hackworth

After speaking with Bensinger, Dion's mother spoke with Secretary-Treasurer Hackworth. According to Hackworth, Dion's mother said that she worked in Orange County and it was a long way for her to come to the Union's office. Hackworth explained that the Union prefers for new hires to come to its office to fill out paperwork

and obtain information regarding medical insurance. Dion's mother responded that Dion did not need medical insurance.

She also said she did not want Dion to come to the Union office because she was afraid the Union would pressure him to become a full member. (Tr. 55-56) Hackworth explained that the Union would not pressure him, it was not their style, they were "not like a used car salesperson," and that there was no reason for the Union to do so since he had already made known his intent not to join the Union. (Tr. 55-56, 56-57) Dion's mother then said she was contacting National Right to Work; Hackworth responded that that was her choice and ended the phone call by telling her to have a nice day. (Tr. 56)

While speaking to Dion's mother, Hackworth made notes of the conversation on a piece of paper near her phone. (Tr. 56) Three days later, on August 23, 2013, she transferred those notes to Dion's file in the Union's computer system. (Tr. 56) Later, on September 3, 2013,

Hackworth revised the note she had written in Dion's file to insert the date of her conversation with Dion's mother. (Tr. 71-73) Hackworth memorialized the conversation as follows:

> Spoke to mom on 8/20 explained proc for joining – come in for paperwork. Mom mentioned pressure to become full mbr. Told her no pressure that is not what we do (i.e. he had already written a letter explaining his intent), just need to come in to complete paperwork (our standard procedure. I also explained that our office also explains med benefits (mom said he doesn't need them). Mom complained about drive, that she worked in Orange County and...threatened to hire right to work attorney. I politely ended phone call.

(RX 1, at 1)

Dion's mother confirmed that Hackworth explained the Union's rationale for instructing new hires to affiliate in person – filling out paperwork and obtaining information about medical insurance – and that the call ended with Dion's mother threatening to involve the National Right to Work Foundation. (Tr. 38) However, she denied that Hackworth reassured her that the Union would not pressure Dion to

become a full member. (Tr. 44) She further alleged that Hackworth said Dion was going to get health insurance even though he didn't need it. (Tr. 37)

Following these telephone conversations, the Union had no further contact with Dion's mother. (Tr. 56, 84) Dion himself has never spoken to anyone affiliated with the Union. (Tr. 28)

G. THE UNION'S IN-PERSON AFFILIATION PRACTICE

The Union's practice of instructing all new hires to affiliate with the Union in person predates Hackworth's employment with the Union. (Tr. 58-59) Hackworth has been Secretary-Treasurer for eleven years, and held other jobs at the Union before that. (Tr. 54-55)

In-person affiliation is an important administrative practice for the Union because it deters forgeries and impersonation. The Union has had problems in the past with people impersonating Union members either in writing on the telephone. For instance, during a labor dispute ten years ago, the Union received multiple documents by mail and fax that purported to be letters from Union members resigning their membership. The Union later learned these letters were forgeries and that the members in question had never wanted to resign from the Union. (Tr. 59-61, 75) The Union's "welcome letter" therefore asks new employees to not only come to Local 135's offices, but to be prepared to "present a form of current ID." (JX 1 Exh. 2)

In addition, in-person affiliation allows the Union to educate new employees about their rights under the Agreement, to give them a summary of the health insurance plan provided to employees, to notify them about other benefits, such as tuition assistance, scholarship programs, and discount tickets provided through the Union, and to explain how the dues and fees associated with the employee's job classification are calculated. The represented employee has an opportunity to ask questions about these and other topics, bring his dues current, and become familiar with the union that will be representing him. (Tr. 86-87)

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The Union also uses this visit to verify the individual's contact information, job classification and store information, which is sometimes different than the information the Union has received from the Employer. (Tr. 98-99) In addition, the Union provides the employee with up-to-date contact information for the Union representative assigned to his store, as Union representatives' assignments change periodically. (Tr. 63, 77-78)

The Union advises all new hires to affiliate in person, regardless of whether they desire to become full members of the Union. The affiliation procedure is the same for those who choose full membership and those who do not. (Tr. 62-63, 90) Nobody is told that full Union membership is required. (Tr. 87)

If a new hire says she does not want to join the Union, the Union does not pressure that person to join or discourage that choice (Tr. 55, 93). It has a supervisor such as Bensinger or Hackworth speak to the individual about the benefits of Union membership and the rights the employee will forgo by declining Union membership. (Tr. 87, 96-97)

Notwithstanding the Union's preference that all represented employees affiliate in person, not all employees do so. The Union represents approximately 47 employees in Imperial County, who it has instructed to affiliate by mail because their work sites are too far from the Union's office. (Tr. 61-62, 88-89; GCX 2) The Union has also mailed affiliation documentation to an employee who was unable to affiliate in person because the employee was in the hospital. (Tr. 62) On another occasion, a homeless employee was not asked to affiliate in person. (Tr. 88)

There is no consequence to represented employees who fail to affiliate with the Union in person. (Tr. 61-62) The Union accepts requests for non-member status as long as they are in writing, regardless of whether the employee affiliates in person. (Tr. 87-88, 94, 97) The Union has never sought to enforce the union security clause against any person for failing to affiliate in person. (Tr. 62) Indeed, Charging Party has never affiliated with the Union in person and the Union has not taken any action against him. (Tr. 75-76, 97)

III

STATEMENT OF QUESTIONS PRESENTED

1. Did the Administrative Law Judge err by failing to apply the tripartite standard applicable to duty of fair representation cases under *Marquez* and *O'Neill* in determining whether the Union breached its duty of fair representation by adopting a requirement that new employees of covered employers come to the Union's offices to affiliate? [Exception No. 2]

2. Did the Administrative Law Judge err in finding that the Union had required Charging Party Brandon Dion to come to the Union's office to affiliate and threatened him with discharge pursuant to the union security clause of its collective bargaining agreement with Ralphs Grocery Company if he did not do so? [Exception No. 1]

3. Did the Administrative Law Judge err in finding that asking new employees to come to the Union office imposed a significant burden on those employees and that this burden outweighed the legitimate interests advanced by the in-person affiliation policy? [Exception No. 2]

4. Did the Administrative Law Judge err in adopting a rule that conflicts with Board law? [Exception No. 4]

5. Did the Administrative Law Judge err in holding that the Union had breached its duty of fair representation by failing to provide Dion with a detailed apportionment of its and its affiliates' expenditures for representational and nonrepresentational activities? [Exception No. 5]

6. Did the Administrative Law Judge err in ordering that the Union cease and desist from certain specified actions and take other specified actions? [Exception No. 6]

The answer to each of these questions is "Yes."

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IV

ARGUMENT

A. THE UNION'S PRACTICE OF INSTRUCTING NEW HIRES TO AFFILIATE IN PERSON DOES NOT VIOLATE ITS DUTY OF FAIR REPRESENTATION

The Union has for years requested all new employees, both those who wanted to join the Union and the much smaller percentage who elected not to, to come to its offices to fill out any paperwork. Bringing new employees to the Union's office allows the Union to reduce the risk that someone might not only be impersonating that employee, but misrepresenting his or her wishes – a risk that has prove to be quite real on more than one occasion. It also gives the Union the opportunity to brief new hires about their rights under the collective bargaining agreement that covers them, to provide them with summaries of the benefits to which they are entitled, and to confirm the accuracy of the contact information their employers have provided to the Union.

According to the Administrative Law Judge's decision, this practice violates the Union's duty of fair representation, even though it applies on the same terms to both those employees who are applying for membership in the Union and those who elect to pay either agency fees or their financial core share. As the decision states:

> Although the Union has raised legitimate concerns for its requirement that new hire employees affiliate in person, its rule infringes on employees' right to join or not join the Union by adding a requirement before the employees may fulfill their obligation under the union-security clause to affiliate with the Union. I find that this requirement is arbitrary in that it imposes a significant burden on employees whether affiliating as full members, nonmembers who pay an "agency" fee, or as Beck objectors. The Union presented no evidence to show that its method of in-person affiliation costs less than other potential methods.

(ALJ Decision 13:9-15) The Administrative Law Judge's analysis is wrong on every major point. It must be reversed.

1. <u>The Administrative Law Judge Applied The Wrong Standard</u>

We start with the Supreme Court's decision in *Marquez*, which corrected a similar misapplication of the duty of fair representation by the Ninth Circuit. As the Court

explained, the duty of fair representation that governs a union's administration of a union security clause is the same duty that applies to its negotiation of a collective bargaining agreement or handling of a grievance. The Court specifically rejected any notion that a different standard applied under *Beck*.

The Court also rejected the sort of balancing test used by the Administrative Law Judge:

> This "wide range of reasonableness" gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong. In *Air Line Pilots*, for example, the union had negotiated a settlement agreement with the employer, which in retrospect proved to be a bad deal for the employees. The fact that the union had not negotiated the best agreement for its workers, however, was insufficient to support a holding that the union's conduct was arbitrary. 499 U.S., at 78-81. A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation. *Ibid.*

Id., 525 U.S. at 45-46. This "wide range of reasonableness" standard bars the Board from conducting the sort of cost benefit analysis employed by the Administrative Law Judge.

There is nothing irrational in requesting new employees, whether they plan to join the Union or not, to come to the Union's office to complete the process. The Union has, in fact, had to deal with the problem of impersonation in the past when unknown persons, claiming to be Union members, sent the Union phony resignation notices from those members. Having the individual make that request in person reduces that risk.

This case, in fact, illustrates the benefits of in-person affiliation in less extreme circumstances. While the Union received a registered letter from Dion in which he purported to decline Union membership, it had no assurances that this was his wish, rather than his mother's. She was, as it turns out, prepared to speak for him on any number of issues – telling the Union, for example, that her son did not need the health benefits to which he was entitled under the Agreement. Dion never declined benefits coverage, nor did he ever call the Union to confirm the contents of that registered letter.

It does not matter, in one sense, whether that letter did or did not accurately reflect his views, since the Union provided him with the dues reduction he requested in any event. But it does matter as far as the legitimacy of the Union's in-person affiliation

policy is concerned, since it illustrates that the Union's concerns on this point, far from being irrational, were grounded in actual experience. That forecloses any possible claim that the Union's policy was arbitrary.

Nor can the General Counsel prove that the Union violated any of the other parts of the tripartite *Marquez/O'Neill* standard. The Union's policy is not, for one thing, discriminatory; on the contrary it applies equally to both those employees who choose to join the Union and those who choose not to. The General Counsel has never claimed otherwise, much less offered any evidence to support such a claim.

There is likewise no evidence to suggest that the Union has acted in bad faith. The Union did not adopt this in-person affiliation policy in order to single out Dion or interpret it in a way that would enable it to treat Dion more harshly than other new hires. Far from it: the Union has given Dion the benefit of every doubt, accepting his written *Beck* objection notwithstanding the grounds it had to doubt its authenticity. These fair representation allegations against the Union must be dismissed.

2. The Union's Legitimate Interests Far Outweigh Any Burden Imposed on Dion

The General Counsel could not prove that the Union violated the Act, moreover, even if we were to apply the balancing test used by the Administrative Law Judge. The Union's interests in requiring new employees to come to its office are significant and weighty, while any burden imposed by the Union's in-person affiliation policy was inconsequential. *UAW Local 376 (Colt's Mfg. Co., Inc.)*, 356 NLRB No. 164 (2011) (annual renewal requirement lawful on the facts of that case). The Union has, moreover, reduced any possible burden to employees by applying this rule flexibly, in response to the facts of each individual case. The rule is lawful.

The most important interests served by this in-person affiliation rule is avoiding the sort of forgeries by impersonators that the Union has encountered in the past. Preventing fraud is important not only to the Union, but to these new employees as well.

This is something, moreover, that cannot be done at long distance, whether by mail or email or telephone. The Administrative Law Judge did not suggest any alternative to this requirement that would have been effective. Indeed, the decision concedes that the Union's concerns are legitimate. (ALJ Decision 13:9)

This interest in protecting the Union and the employees it represents from malicious impersonators cannot, moreover, be quantified in dollars and cents. The same is true for the Union's interest in educating new employees about their rights and updating and correcting the contact information supplied by the employer. The fact that these concerns do not come with a dollar sign attached to them does not, however, make them any less important.

The Administrative Law Judge's decision chooses, however, to ignore these interests and to focus almost exclusively on one interest that could be monetized: the savings that could be realized by having new employees come to the Union's offices rather than having to locate them at their workplaces. The decision's cost-benefit analysis simply ignores the evidence that does not fit its preconceptions or lead to the result it seeks.

The decision would still be wrong, moreover, even if the only possible goals to be achieved by asking new employees to come to the Union's office were financial because the burden of that requirement is so slight. While the decision describes the burden as "significant" (ALJ Decision 13:13), it offers no factual support for that label. The decision also does not take into account the Union's flexible application of that requirement, which makes any theoretical burden far less significant in practice.

That is, however, a problem with both the General Counsel's presentation and the Administrative Law Judge's decision: when called on to show that the Union's in-person affiliation policy was arbitrary, they resort to labels, rather than evidence. That is not enough, however, to prove a violation of the Act. The Administrative Law Judge's decision should be reversed.

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3. The Union Did Not Restrain, Threaten or Coerce Dion

The Administrative Law Judge's decision also holds that the Union's policy violates Section 8(b)(1) of the Act because requiring employees to come to the Union in person to either join the Union or become agency fee payers or *Beck* objectors (1) contains the implicit threat that they could be fired if they refuse to make the trip and (2) therefore represents an attempt by the Union to have employees fired for a reason other than their nonpayment of dues and fees.

This theory collapses on close examination. The case on which the decision rests most heavily, *Plumbers Local 314 (American Fire Sprinkler Corp.)*, 295 NLRB 428 (1989), is not only clearly distinguishable, but serves, in its way, to illustrate why the theory that the decision offers cannot be applied to the facts of this case.

The policy at issue in *American Fire Sprinkler* required employees to first pay off any fines that had been imposed on them before the union would accept their dues payments; the union then sought to have workers who had not paid their fines as well as their dues fired for those delinquencies. The unlawfulness of that is easy to see, since the policy subjected these employees to discharge for failing to pay fines, something the Act does not permit.

The Administrative Law Judge's decision insists that the same analysis applies to this case because, so the argument goes, (1) the Union is insisting the employees come to its office to join the Union or declare themselves to be Beck objectors and (2) has threatened to have anyone who tries to do either of those things without coming to its office fired. There are only two problems with this theory: neither the facts nor the law support it.

The General Counsel's theory rests on a false premise: that the Union's in-person affiliation policy contains an implicit threat of discharge if the employee does not come to the Union's offices. That implication turns out, however, to be extremely tenuous: the Union has never sought to bring about the discharge of an employee who did not come to one of its offices to affiliate or threatened to do so. On the contrary, the Union

has made numerous exceptions to the in-person affiliation requirement on occasions and accepted *Beck* objections from employees who had not come to the Union's offices.

This case illustrates the point: the Union not only did not attempt to have Dion fired for his failure to come into its office to make his Beck objection, but gave him the dues reduction requested in the August 5, 2013 letter without once speaking to him directly, either in person or by telephone, much less requiring him to come into the Union's offices. The General Counsel is attacking a policy of his own imagining, not the one that actually exists.

The record establishes, moreover, that the Union has not threatened employees with termination for not coming into the office to affiliate. The Union's "welcome letter," which instructed Dion to come to the Union's office to complete the affiliation process, does not state anywhere that there would be any adverse employment consequences if he failed to affiliate in person.

Nor is any such threat implicit in any of the Union's correspondence or other statements. The packet of documents that the Union sent Dion in July 2012 not only advised him of his right to decline to join the Union, but instructed him to "notify the union, in writing, if this is the route you choose, and you will be provided additional information." No one reading this would assume that appearing in person was the only means by which one could complete the affiliation process.

The Union's August 16, 2013 letter likewise does not imply that Dion could be fired solely for failing to personally appear at the Union's office. In that letter, the Union notified Dion that it would enforce the union security clause against him if he failed to fulfill his financial obligations to the Union by the deadline set out in the letter. No one has claimed that this notice was unlawful. It then gave him the address at which he could pay that delinquency, and invited him to resolve this matter:

> We understand that this may be your first experience with a labor union and we would love the opportunity to explain the benefits of being a Union member. We look forward to seeing you at one of our offices to begin your membership.

(JX 1, Exh. 3, ¶ 3) While the letter contained a lawful threat of discharge if Dion does not respond to it, it made it clear that the issue was whether he had or had not paid the dues he owed – not whether he had come to the Union's office. The Administrative Law Judge's suggestion that this letter is a veiled threat of discharge for not coming to the Union's office misses the point altogether. *See Sav-On Drugs*, 227 NLRB 1638 (1977) (asking an employee to come to the Union's office did not "imply a threat...that [the employee] would suffer a loss of employment").

Finally, the Union's August 22, 2013 letter contains no threats to have Dion fired if he did not show up at the Union's offices to make his *Beck* objection. Far from it: the Union acknowledged Dion's request for reduced dues and notified Dion of his new dues rate. Dion could not have reasonably construed this letter as a refusal to reduce his dues unless he affiliated in person, much less to have him fired on that ground, since the letter notified him that he had been given the reduction he requested, without setting foot in the Union's office.

Nor did any of the Union's telephonic conversations with Dion's mother change that. While the Union representatives with whom she spoke told her that her son needed to come to the Union's office to take care of affiliation, none of them ever suggested that he would be fired if he did not. Far from it, the Union was attempting to enter into a dialogue with Dion, rather than his mother, and urging him to come into the office, not threatening him with discharge. No one, including Dion's mother, could have reasonably concluded otherwise.[1]

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[1] Ms. Dion proved, moreover, to be an unreliable witness and should not be credited to the extent that she claims that she felt threatened. She claimed, for one thing, to have difficulty understanding words such as "affiliate," "non-member," or "Beck" rights. That alone makes it much less likely that she could have accurately remembered remarks she now claims she did not understand.

Moreover, she testified evasively on the subject of non-member status. When first asked whether Bensinger mentioned "non-member status" during the August 20 phone call, she claimed she couldn't recall. Then, when asked the same question regarding Hackworth, she claimed she did not understand the question. When the question was further clarified, she responded: "At any point did they say anything about him being a non-member, it's just hard for me to answer that question without

The Administrative Law Judge's theory would fail in any case, even if the Union had actually sought to have employees discharged for failing to come to its offices to affiliate, rather than for their failure to pay the dues they owed. Unlike the "fines before dues" policy found unlawful in *American Fire Sprinklers*, the Union's requirement that new employees come to its offices to affiliate is not an attempt to highjack the union security clause to achieve other, unrelated goals, such as collection of unpaid fines, but is instead a method to enforce the union security clause itself. Far from supporting her position, the Administrative Law Judge's reliance on clearly distinguishable decisions such as *American Fire Sprinklers* only serves to show just how threadbare it is.

Holding that unions cannot require employees to come to their offices to affiliate or pay their delinquent dues would, moreover, harm both unions and the employees they represent. The Board has long required that unions, as a condition to enforcing the union security provisions against delinquent employees, first inform employees how much they owe, how that figure was calculated, what the deadline for payment is and what steps they need to take to avoid termination on this ground. *See, e.g., Teamsters Local 122 (August A. Busch & Co. of Mass., Inc.)*, 203 NLRB 1041, 1042 (1973), *enf'd* 509 F.2d 1160 (1st Cir. 1974). The Union did just that in this case by giving Dion explicit directions in its August 16, 2013 delinquency notice as to where he needed to go to pay what he owed.

The Administrative Law Judge's decision, taken at face value, would prohibit this, on the theory that it would be too burdensome to require an employee who was at risk of discharge for not paying his dues to go to the union's office to clear up the delinquency. That is nonsense.

That would also make matters worse for both the union and the employee. It is hard to see just what directions the union could give an employee who needed to pay delinquent dues in order to avoid discharge if this rule prevailed. The employee would

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more clear specifics about what you are asking me..." Finally, when counsel rephrased the question a fourth time, she again contended she could not remember.

be deprived of the clear and understandable notice she needed to avoid discharge, while the union would be unable to maintain a simple, uniform system for collection of dues.

It also runs counter to Board law on this issue. A union does not have to tolerate employees who would rather play hide and seek than pay their dues. *Local 630, IBT (Ralphs Grocery Company)*, 209 NLRB 117, 125 (1974) (union lawfully obtained discharge of employee who deliberately evaded union's efforts to notify him of his dues obligations); *Big Rivers Elec. Corp.*, 260 NLRB 329 (1982) (same). The Union has the right to give delinquent employees notice that it is their obligation to pay their dues, then give them the addresses and times when they could make those arrangements, without negotiating with each individual employee on how he prefers to make those payments.

It is time for the Board to show some common sense in this area. The Union's requirement that employees come to its office to affiliate does not impose any significant burden on employees; far from it, this requirement gives them the clear and understandable notice on how to comply with their union security obligations that the law encourages unions to provide. In addition, barring the Union from requiring employees to come to the office would put employees at risk of having their wishes misrepresented by third parties, while depriving them of the benefits of learning what rights they have under their collective bargaining agreement and getting answers to whatever other questions they might have, whether they concern the benefits available as a condition of Union membership or the job security and seniority rights they will earn once they pass probation. The Administrative Law Judge's blanket rule will do more harm than good.

Furthermore the facts of this case show just how detached from reality the Administrative Law Judge's decision is. The Union never threatened to have Dion fired if he did not come to its offices to affiliate. Nor did it reject his request to pay lower dues on that ground; on the contrary, it made that change on the basis of the August 5,

2013 letter, even though Dion never set foot inside either of its offices. This case should never have been brought.

B. THE ALLEGATIONS REGARDING THE UNION'S ALLEGED FAILURE TO PROVIDE DION A BREAKDOWN OF ITS EXPENSES MUST BE DISMISSED

The Administrative Law Judge also found that the Union violated the Act by failing to provide Dion with a detailed apportionment of its expenditures for representational activities. Significantly, however, neither the General Counsel nor the Charging Party presented any evidence at the hearing in support of this allegation. There is no evidence in the record that the Union, in fact, failed to provide Dion the described information.

The only references in the record to this subject are counsels' remarks regarding the Union's motion to dismiss Paragraph 10(c) of the Complaint. As Charging Party's counsel pointed out, however, attorneys' remarks are not evidence. Therefore, Paragraphs 10(c) and (d) of the Complaint should have been dismissed, based on the complete lack of evidence in the record to support the allegations therein.

In addition, the entirety of Paragraph 10 should have been dismissed on the merits. Even assuming for the sake of argument that the Union failed to provide the described information to Dion – which the Union disputes – the General Counsel and Charging Party have not demonstrated that the Union was obligated to provide it.

The applicable standard for evaluating the Union's alleged failure to provide Dion financial information under *California Saw and Knife Works*, 320 NLRB 224 (1995) is whether the Union breached its duty of fair representation – *i.e.*, whether "in light of the factual and legal landscape...the union's behavior is so far outside a wide range of reasonableness as to be irrational." *UFCW Local 700 (Kroger Limited Partnership)*, 361 NLRB No. 39 at 5-6 (2014).

Under established Board law, a union need not provide a represented employee detailed financial information about its expenditures "until [the] employee elects

nonmember status and then takes the additional step of objecting to paying for non-representational expenses." *Kroger*, 361 NLRB No. 39 at 1 (emphasis added) *Beck* objections "usually turn on ideological concerns" and are "grounded in the notion that an employee [must decide] whether her political beliefs are compromised by paying full fees and dues to the union, which absent an objection, may expend those funds on causes with which the employee disagrees." *Kroger*, 361 NLRB No. 39 at 7.

Dion's letter was not a *Beck* objection triggering the Union's legal obligation to provide financial disclosures because the letter did not suggest in any way, shape or form that Dion was politically or ideologically opposed to funding the Union's nonrepresentational activities. To the contrary, Dion implicitly expressed support for the Union's nonrepresentational activities by asserting he wanted to join the Union in the future, when he was closer to graduating from high school.

The Union fulfilled its duty of fair representation to Dion, moreover, by providing him the information he requested. His letter, quite simply, said: "Please let me know about the reduced fee for non-members." (JX 1, Exh. 4) The Union promptly complied by sending him a letter specifying the reduced dues rate for his job classification. (JX 1, Exh. 5) In light of his failure to object, no further information was required. The Union's response was entirely reasonable in light of existing law, and, as a result, the Union did not breach its duty of fair representation to Dion.

Further, the General Counsel and Charging Party cannot show that the Union breached its duty to Dion based on conversations with his mother. Even if Dion's mother requested a breakdown the Union's expenses during one of her telephone calls (which she did not), there is absolutely no legal authority that compels the Union to take direction from Dion's mother when Dion himself did not speak up. A minor employee is still an employee, with the capacity to speak for himself, whether that means voting in an NLRB election or asserting his rights under the law. *E.J. Kelley Co.*, 98 NLRB 486, 487-88 (1952).

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It was Dion's choice whether to join the Union and whether to object to paying for nonrepresentational expenses – not his mother's. The Union did not violate the Act by refusing to treat Dion's mother as if she had the power to decide those matters for him.

IV

CONCLUSION

For all the reasons set forth above, Respondent United Food and Commercial Workers Union, Local 135, United Food and Commercial Workers International Union, AFL-CIO, CLC respectfully requests that its exceptions be upheld and the Complaint in this matter be dismissed.

DATED: March 18, 2015

SCHWARTZ, STEINSAPIR, DOHRMANN & SOMMERS LLP
TAMRA M. SMITH

By Tamra M Smith
TAMRA M. SMITH
Attorneys for Respondent United Food and Commercial Workers Union, Local 135, United Food and Commercial Workers International Union, AFL-CIO, CLC

PROOF OF SERVICE BY MAIL AND E-MAIL

UFCW Local 135 (Ralphs Grocery Company)
NLRB Case No. 21-CB-112391

HENRY M. WILLIS certifies as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5268, **Facsimile No.: (323) 655-4488, e-mail: hmw@ssdslaw.com.**

On February 19, 2015, I caused the foregoing document(s) described as

BRIEF OF UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 135, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF EXCEPTIONS

__X__ **BY PLACING FOR COLLECTION AND MAILING:** By placing a true and correct copy (copies) thereof in an envelope (envelopes) addressed as follows:

Glenn Taubman, Attorney at Law National Right to Work Legal Defense Foundation, Inc. 8001 Braddock Road, Suite 600 Springfield, Virginia 22160	Robert MacKay, Attorney at Law National Labor Relations Board Region 21 555 W. Beech St., Ste. 418 San Diego, CA 92101-2940

and by then sealing said envelope(s) and placing it (them) for collection and mailing on that same date following the ordinary business practices of Schwartz, Steinsapir, Dohrmann & Sommers LLP, at its place of business, located at 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5202. I am readily familiar with the business practices of Schwartz, Steinsapir, Dohrmann & Sommers LLP for collection and processing of correspondence for mailing with the United States Postal Service. Pursuant to said practices the envelope(s) would be deposited with the United States Postal Service that same day, with postage thereon fully prepaid, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing in the affidavit. (C.C.P. §1013a(3))

__X__ **BY E-MAIL:** By transmitting a copy of the above-described document(s) via e-mail to the individual(s) set forth above at the e-mail addressed indicated.

Glenn Taubman, Esq. **e-mail:** gmt@nrtw.org	Robert MacKay **e-mail: Robert.MacKay@nlrb.gov**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 19, 2015, at Los Angeles, California.

HENRY M. WILLIS

ID # 256515